Mamone & Ors v Gagliardi & Ors [2000] NTSC 95

PARTIES:	MAMONE, Antoinette BLAIKLOCK, Maria, and GAGLIARDI, Elena v GAGLIARDI, Jesse Aaron GAGLIARDI, Shane Joseph GAGLIARDI, Justine Ellen Rose PODUTI, Steven Venturino DRUSETTA, Jenny PODUTI, Josephine, and CAMPAGNA, Ricky Patrick
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20005333
DELIVERED:	30 November 2000
HEARING DATES:	16 & 20 November 2000
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

Succession – wills, probate and administration – interlocutory matters – subpoenas by defendant for production of documents in possession of third party relating to testator's health care over various periods, but mainly covering 1995 to 1999 – whether subpoenas are limited to the documents which are relevant to any issue in the action.

Supreme Court Rules, O 42, r 42.01 and r 42.02
Waind v Hill [1978] 1 NSWLR 372, followed.

Procedure – Supreme Court procedure – discovery from a non-party – whether procedure adopted by defendants amounts to abuse of the process of the court.

Evidence Act 1994 (NT), s 12(2)
Supreme Court Rules, O 32, O 42, r 42.01, r 42.02 and r 42.06
Practice Direction No 12 of 1983
CCC v Shell (1999) 161 ALR 686 at 696, applied.
Lucas Industries Ltd v Hewitt & Ors (1978) 18 ALR 555 at 565, applied.

REPRESENTATION:

Counsel:

Plaintiffs:	Mr J Stirk
Defendants:	Mr D Francis

Solicitors:

Plaintiffs:	Povey Stirk
Defendants:	David Francis & Associates as agents for Giasoumi Papasavas Zeros Pty Ltd (Vic)

Judgment category classification:	B
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Mar20032

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Mamone & Ors v Gagliardi & Ors [2000] NTSC 95
No. 20005333

BETWEEN:

ANTOINETTE MAMONE,
MARIA BLAIKLOCK and
ELENA GAGLIARDI
Plaintiffs

AND:

JESSE AARON GAGLIARDI,
SHANE JOSEPH GAGLIARDI,
JUSTINE ELLEN ROSE GAGLIARDI,
STEVEN VENTURINO PODUTI,
JENNY DRUSETTA,
JOSEPHINE PODUTI and
RICKY PATRICK CAMPAGNA
Defendants

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 30 November 2000)

[1] In this action the plaintiffs seek an order for the grant to them of probate of the will dated 18 February 1999 of the late Guiseppe Gagliardi. Mr Gagliardi died on 15 December 1999.

[2] The defendants oppose the grant broadly upon the grounds that the testator lacked testamentary capacity at the relevant time and that one of the plaintiffs, Antoinette Mamone, exercised undue influence over the testator.

[3] Pursuant to orders made by the Court, the defendants were obliged to file and serve affidavits of the evidence proposed to be given in their case. Consequential orders were made regarding affidavits on the part of the plaintiffs and discovery. Within extended time allowed the defendants filed a number of affidavits from individuals who, it appears, observed the deceased in the later stages of his life. The material filed arguably goes to both grounds for opposing the grant. There is no application by the defendants that evidence be received other than by affidavit and cross-examination.

[4] The defendants have instructed a Victorian solicitor, Mr Galatas, to act on their behalf. In turn, he appointed a Darwin firm of solicitors who appeared as the solicitors on the record. The deceased lived in Alice Springs and many of the parties live in and around that town. The Darwin solicitors applied for an order that they have leave to cease to act by summons of 30 October. Leave was unnecessary, and on 3 November they filed a notice of ceasing to act (r 20.03). Another Darwin solicitor, Mr Francis, has now commenced to act on behalf of the defendants on instructions from Mr Galatas.

[5] Notwithstanding the orders regarding the giving of evidence by affidavit, in his affidavit of 11 October, Mr Galatas said that the defendants would also rely upon documents which they intended to subpoena from "hospitals and other health services who were involved with the deceased during the time of his illness and in his later years".

[6] In his affidavit of 3 November, Mr Galatas said that whilst he sought to obtain information from the deceased testator's "health care and aged care providers" it did not prove possible to obtain affidavits from them, "due to questions of privilege and confidential information or perceived privilege and confidential information". The identity of the "providers" was not disclosed.

[7] However, Mr Galatas went on to depose to his having spoken to Dr Pevie, whom he understood to be "Mr Gagliardi's long term treating doctor", and was informed by Dr Pevie that he had provided information and sworn an affidavit prepared by the solicitors for the plaintiffs. Dr Pevie declined to repeat the process, and suggested to Mr Galatas that he contact the solicitors for the plaintiffs and read the affidavit held by them. Mr Galatas went on to say that those solicitors, Messrs Povey Stirk of Alice Springs, told him that they were under strict instructions not to release the doctor's affidavit. Mr Galatas said he tried to pursue the matter with Dr Pevie, but he again declined to assist him.

[8] On 30 October Mr Galatas personally attended at the registry of the Court at Alice Springs and caused three subpoenas to be issued for the production of documents. They were directed to Dr Pevie, the Alice Springs Hospital and the Old Timers Home at Alice Springs. They required that there be produced to the Court at Alice Springs on 1 November documents relating to the treatment, care and supervision of the deceased for various periods, but

covering 1995 to 1999. The documents were produced to the Registry as required by the subpoenas.

[9] The defendants now seek access to the documents so produced, and the plaintiffs resist the application and apply to have the subpoenas set aside as an abuse of process.

[10] The action is at the stage where directions have been given as to the giving of evidence upon the hearing. No date has been set for the hearing. It is plain that the subpoenas were served with a view to securing the production of documents to the court in anticipation of the defendants being given permission to inspect them with a view to ascertaining whether there was anything thereby disclosed which might touch upon the issues in the case, particularly in regard to the deceased's testamentary capacity.

[11] Subpoenas are dealt with in O.42 of the Supreme Court Rules. A subpoena for production is an order in writing requiring the person named to attend as directed by the order for the purpose of producing a document or thing for evidence (r 42.01). The court may order a person named to attend at the trial or any other stage of the proceedings for the purpose of giving evidence or producing a document or thing for evidence (r 42.02). The date upon which the subpoena required the production of the documents to the court was not a date of trial or a date fixed for any other stage of the proceedings. It was a date fixed by Mr Galatas to suit his convenience. The production of the documents was secured not for evidence, but for the purpose of

inspection to ascertain if they revealed any evidence. On their face, the subpoenas are not limited to documents which are relevant to any issue in the action (*Waind v Hill* [1978] 1 NSWLR 372).

[12] Assuming the documents produced comply with the terms of the demand in the subpoenas, then it may well be that any of the persons producing the same are entitled to object to some or all of them being made available to the parties for inspection. For example, see the restraint upon a medical practitioner divulging communications by his patient, Evidence Act s 12(2) and Practice Direction No 12 of 1983.

[13] There is a particular procedure provided for in O.32 of the Supreme Court Rules for discovery from a non-party. It ensures that every party to the proceeding is given notice of the application and is entitled to be heard along with the person against whom the discovery is sought. It is a procedure which allows for proper objection to be made to the orders sought, before any order is made.

[14] The defendants have utilised the subpoena in an endeavour to achieve an objective for which it was not intended and for which another specific procedure is provided (*CCC v Shell* (1999) 161 ALR 686 at 696 and the cases there cited). That procedure allows for proper consideration and an opportunity for objections to be raised to the application raising the questions of privilege or the like.

[15] Counsel for the defendants referred to *Lucas Industries Limited v Hewitt & Others* (1978) 18 ALR 555. In that case the Full Court of the Federal Court was dealing with an appeal in respect of an order made in the Supreme Court of Victoria that a subpoena duces tecum which had issued out of that court on behalf of Lucas Industries Limited seeking production of documents by parties, not parties to the action, be set aside. An order had been made in the High Court, (before the matter was referred to the Supreme Court of Victoria) that "expert evidence in the action be by affidavit with the usual rights of cross-examination …". Each party, having filed and served affidavits by way of expert evidence-in-chief, the appellant, that is, Lucas Industries Limited, issued a summons seeking directions as to the time for filing and serving affidavits in reply. Counsel for the non-parties upon whom the subpoenas were served submitted that the orders made by the Supreme Court should be affirmed and contended:

(a) that having regard to the stage at which the proceedings stood an attempt to seek production of documents was premature;

(b) that in substance the subpoena was an attempt to subject the respondents who were not parties to the action to an obligation to make discovery;

(c) that the subpoena was oppressive and fishing;

(d) that the subpoena was addressed to remote and unidentifiable parties.

[16] At p 565 Smithers J, with whom Bowen CJ and Nimmo J agreed, said that:

> "in a case where the filing and serving of affidavits of experts before the hearing is ordered, and where there are documents in the possession of a stranger to litigation, the existence and relevance of which appears from the affidavits filed and served by way of evidence-in-chief, and the contents of those documents are seen to be proper for consideration of and comment by experts by affidavit in reply, practical considerations point to the desirability of those documents being produced from the time of the preparation of affidavits of experts in reply has arrived."

[17] His Honour went on to say that in the proceedings before the court that time had arrived. The preconditions referred to do not exist here and the time has not arrived.

[18] Other passages in his Honour's reasons upon which the defendants place some reliance, must be seen in the light of the issue which was before the court. That issue has not arisen here. The defendants submitted that the documents being in possession of the court, the parties should be permitted to inspect them, but I accept what was put by counsel for the plaintiffs, that the ends do not justify the means, a fortiori where the means amount to an abuse of the process of the court. I am satisfied that that is the case.

[19] I should add that in my view r 42.06 does not assist the defendants. It is predicated upon a proper subpoena having been issued for production at a hearing and enables the person receiving the subpoena to produce the documents in advance of the date fixed for the hearing.

[20] The subpoenas are set aside (r 42.07). The documents produced are to be returned to those who produced them. They should, of course, be retained by them as some may be required at a later stage of these proceedings.
